FILE COPY

Office Supreme Court, U.S.
FILED
FEB 6 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

DOCKET NO. **683**

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner and Appellant below,

against

WATERMAN STEAMSHIP CO.,
Respondent and Appellee below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOWELL WADMOND
Attorney for Petitioner
14 Wall Street
New York 5, New York

JOHN M. JOHNSTON,
CHARLES F. G. RAIKES,
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

DOCKET NO.

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner and Appellant below,

against

WATERMAN STEAMSHIP CO.,
Respondent and Appellee below.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, International Terminal Operating Co., Inc., prays that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit for review of the judgment entered in the above-entitled action on November 10, 1959.

Opinions Below

The judgment of the United States District Court, Southern District of New York, in favor of respondent,

entered on September 30, 1958, pursuant to an unreported decision of Judge Noonan, which denied petitioner's motion for summary judgment and granted summary judgment in favor of respondent, is found at pages 36a-38a (R. 36a-38a) of the Appendix to the appellant's brief in the Court of Appeals submitted herewith. The opinion of the Court of Appeals for the Second Circuit affirming the judgment is reported at 272 F 2d 15 and is reprinted herein as Appendix A.

Jurisdiction

The statutory provision conferring jurisdiction on this Court is found at 28 U.S.C. §1254(1).

The Judgment of the Court of Appeals sought to be reviewed was entered on November 10, 1959.

Questions Presented

Does an employer, who, pursuant to the Longshoremen's and Harbor Workers' Compensation Act, makes payments for compensation to and medical expenses on behalf of an injured employee have a lien to the extent of such payments on the proceeds of a judgment obtained by an injured employee against a third party tortfeasor responsible for his injury?

If such lien exists, may it be extinguished by a court in an action by the employee against the third party tortfeasor to which the employer is not a party?

Statutory Provisions

The Fourteenth Amendment to the Constitution of the United States and the applicable provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, are set forth in Appendix B hereto.

Statement of the Case

Jurisdiction was conferred on the District Court in the first instance because the action (1) is between citizens of different states and the amount in controversy, exclusive of interest and costs, exceeds $3,000 and (2) arises under and involves an interpretation of a Federal law, the Longshoremen's and Harbor Workers' Compensation Act.

In 1951, Francesco Mancino, a longshoreman was employed by Jarka Corporation (hereinafter referred to as "Jarka"), predecessor corporation to petitioner, in connection with the unloading of a vessel owned by respondent Waterman Steamship Co. (hereinafter referred to as "Waterman"). In the course of such employment Mancino sustained injuries to his leg and Jarka made payments totaling $5,094.02 for medical expenses and compensation for loss of earnings pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as the "Act").

On February 1, 1952, Mancino instituted an action against Waterman in the Supreme Court of New York, pursuant to Section 33 of the Act. Jarka never became a party to that action. On February 8, 1952, Jarka informed Waterman in writing of its payments for compensation and medical expenses and notified Waterman that it would look to it for "reimbursement of expenses that had been or would be incurred covering compensation and medical care pursuant to the provisions of Section 33 of the Longshoremen's Act, in the event a judgment is rendered or a settlement made" (R. 12a).

Thereafter, on March 17, 1953, Mancino's action went to trial and the trial judge, having heard Mancino's case and having denied Waterman's motion to dismiss for failure to establish a prima facie case, said he wanted the case completed without Waterman calling any wit-

nesses. The trial judge then informed the attorneys for Waterman that if they would not settle with Mancino for $17,500, he would find against them in the sum of $35,000 (R. 21a-22a; Appendix to appellant's brief 21a-22a). He also informed Mancino's counsel that in the event Mancino did not accept $17,500 he would find in favor of Waterman (R. 22a; Appendix to Appellant's Brief, 22a). The trial judge directed Waterman's counsel to send word to Jarka to be in court the following morning "to discuss Jarka's rights". Waterman's counsel did inform an employee of Jarka of the judge's request but Jarka declined to appear inasmuch as it was not a party to the action and because it believed that pressure would be asserted upon it to compromise its undisputed right under the Act to reimbursement for the payments made to Mancino and on his behalf. At no time was Jarka informed of the consequences which might result from a failure to heed the judge's directive.

On March 18, 1953 Waterman's counsel informed the trial judge that Jarka had declined to attend as "directed". In view of the trial judge's conduct, the parties settled for $17,500 and the settlement was in the form of a consent judgment. The next day the judge, antagonized by Jarka's refusal to attend, ordered Waterman's counsel to deliver a check in the sum of $17,500 to Mancino in payment of the entire judgment, without regard to Jarka's asserted lien, and directed Waterman's counsel to have no further communication directly or indirectly with Jarka or any of its employees until judgment had been entered and satisfied (R. 25a; Appendix to Appellant's Brief, 25a).

Waterman, pursuant to the trial judge's directions, delivered to Mancino the entire proceeds of the settlement. Consequently, Jarka was never reimbursed for its payments.

In October, 1956, Jarka instituted the present action in the Court of the City of New York, County of New York. Waterman removed it to the United States District Court of the Southern District of New York. That Court held that Jarka had a lien on its employee's recovery from Waterman, stating: "Plaintiff's lien on the amount of the recovery was equitable. The defendant knew of its existence of the lien even if the ultimate amount had not been determined." (R. 37a; Appendix to Appellant's Brief, 37a.) However, the Court held that the plaintiff's lien was unenforcible because the trial judge in the action to which Jarka was not a party "determined that the defendant had to pay the Longshoreman the money." The District Court, therefore, directed the entry of summary judgment dismissing the action.

On appeal the Court of Appeals for the Second Circuit affirmed, with a dissenting opinion by Judge Lumbard. The Circuit Court did not expressly decide whether Jarka had a lien on the recovery of its employee. It said: "We hold that, in the present case, in view of the fact that appellant [Jarka] does not dispute that appellee [Waterman] was ordered by a state court of competent jurisdiction to disregard the asserted claim of lien and to turn over the entire amount to the employee, plaintiff employer must look only to its employee for satisfaction of its claim for reimbursement". (R. 60a; 272 F 2d 18.)

Reasons for Allowance of the Writ

1. If the opinion of the Court of Appeals for the Second Circuit in the instant case is interpreted as holding that Jarka had no lien on the recovery, it is in direct conflict with the holding of the Court of Appeals for the Third Circuit in *The Etna*, 138 F 2d 37 (1943).

2. If Jarka did have such a lien, the arbitrary act of the state trial judge in ordering the "forfeiture" of the

lien in an action to which Jarka was not a party and of which Jarka was not given proper notice deprived Jarka of his rights without due process of law; such conduct having been recognized by both the District Court and the Court of Appeals as being improper and "judicial bludgeoning" (R. 36a, 37a, 57a, 62a; Appendix to Appellant's brief 36a, 37a).

Argument in Support of Reasons

The stated ground for affirmance by the Court of Appeals was that Jarka had lost any lien which might have existed because Waterman was ordered by a Court of competent jurisdiction (over Waterman) to pay the amount of the judgment without regard to the asserted lien. If the decision below is interpreted as to denying the existence of a lien, it is in direct conflict with what the Court of Appeals in the instant case itself termed the leading case in this field, decided in another Circuit (i.e. *The Etna, supra*). If Jarka was possessed of a lien, its rights could not be extinguished by a court in a proceeding to which it was not given due notice nor made a party.

1. A lien exists under the Act.

The District Court in the instant case held that a lien had been created in Jarka's favor, saying the "lien on the amount of recovery was equitable". (R. 37a; Appendix to Appellant's Brief.) The Court of Appeals did not expressly pass upon the question of whether a lien existed, but the tenor of opinion is consistent with the existence of a lien. *The Etna, supra*, while not expressly terming Jarka's interest a lien, held that an employer (which incidentally was also Jarka) who paid $3,800 under the Act for compensation and medical expenses to its employee who was injured while unloading the vessel,

Etna had a right to intervene and to share *in the specific proceeds* of a judgment received by the employee against the owner of *The Etna*.

Certainly a simple right to be reimbursed by its injured employee would not entitle the employer to intervene in a litigation against a third party and recover part of the judgment against such party. Consequently, if in the instant case, the Second Circuit has denied the existence of a lien or a legal interest in specific monies, its decision is directly contrary to holding of the Third Circuit in *The Etna*. The right to intervene is a procedural right to enforce a legal interest. It does not create such an interest.

The fact that a lien is created under the Act was also noted in the case of *Fontana* v. *Pennsylvania R. Co.*, 106 Fed. Supp. 461 (Dist. Ct. S. D. N. Y. 1952, Weinfeld, J.), which held that an employer who had made compensation payments under the Act had a "lien", to the extent of such payments, on the proceeds of a settlement between the employee and the third party tortfeasor.

> "Thus *the Act treats the recovery as a fund charged* first with the expense of the litigation and then *with the amounts paid for compensation and medical expenses* and the employee becomes entitled only to any excess finally remaining. *There is no reason why a recovery obtained against the third party by the employee rather than the employer should be distributed differently.*" (Pp. 463, 464. Italics added.)

It is submitted that the decision of the Second Circuit in the instant case should not be interpreted in such a way as to create a conflict between its decision and that of the Third Circuit in *The Etna*.

2. The denial of due process of law.

Jarka at all times asserted its right to a lien on the recovery and its acts were entirely and unambiguously consistent with this position. At no time was any attempt made to inform Jarka of the consequences which would flow from its failure to attend the conference. Basic, elementary notice, so often held by this Court to be a necessary prerequisite to jurisdiction, was not given to the petitioner. About this there can be no dispute. Assuming the existence of a lien, the trial judge's demand, transmitted by word of mouth by Waterman's counsel to Jarka's employee, that the attorneys for Jarka appear at the settlement conference, should not affect rights vested in Jarka. The fact Jarka chose not to attend because it had reason to believe that the trial judge would attempt to force it to accept less than the amount to which it was entitled forms no basis to deprive it of its rights.

3. The decision of the Court below does not effectuate the intention of Congress in establishing the right to reimbursement under the Act.

If the decision of the Court of Appeals in the instant case remains the law, employers subject to the Act will continuously be defrauded of their right to reimbursement by employees offering to settle for a lesser sum if the third party will pay the entire amount of the settlement to the employee and ignore the employer's lien. Moreover, intervention in the action between the employee and the third party will not avoid this consequence because such actions may always be settled out of court.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

LOWELL WADMOND,
Counsel for Petitioner.

JOHN M. JOHNSTON,
CHARLES F. G. RAIKES,
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 243—October Term, 1958.

(Argued June 4, 1959 Decided November 10, 1959.)

Docket No. 25429

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Plaintiff-Appellant.

—v.—

WATERMAN STEAMSHIP CO.,
Defendant-Appellee.

Before:

CLARK, *Chief Judge*,
LUMBARD and WATERMAN, *Circuit Judges*.

International Terminal Operating Co., Inc. appeals from an order of the United States District Court for the Southern District of New York, Noonan, *J.*, granting summary judgment dismissing its suit against Waterman Steamship Co. to recover compensation payments made by International to its employee. Affirmed.

WHITE & CASE (John M. Johnston, of counsel), New York City, for Plaintiff-Appellant.

GAY & BEHRENS (Edward J. Behrens, of counsel), New York City, *for Defendant-Appellee.*

WATERMAN, *Circuit Judge*:

This case presents an unusual question under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901-950. Plaintiff is a stevedoring concern. On April 23, 1951, Francesco Mancino, an employee of plaintiff's predecessor, Jarka Corporation, was injured while unloading defendant's vessel, the S.S. *Bicaville*. Jarka made compensation payments to Mancino without award.[1] Mancino then commenced an action against defendant in the New York State Supreme Court. While this action was pending Jarka notified defendant that it had made compensation payments to Mancino and that it would look to defendant for reimbursement for the amount of such payments should Mancino obtain a judgment against defendant or should the litigation be settled. Pursuant to a plan of settlement devised by the judge before whom Mancino's claim was tried, on March 20, 1953 a judgment was entered against defendant and a check for the amount of that judgment was immediately paid over to Mancino.

Plaintiff filed an action for reimbursement against defendant in October 1956 in the New York Courts and the action was removed to the Southern District of New York. Plaintiff has asserted that it had an "equitable lien" on any judgment or settlement to the extent of the compensation payments it made prior to such judgment or settlement, that defendant had been notified of the existence of this "lien," and that therefore defendant, by its act of paying over the entire judgment to Mancino had, despite the "lien," converted that portion of the judgment equal to plaintiff's compensation payment. In an

[1] 33 U. S. C. 914(a) provides that payments shall begin without award unless the employer contests his liability.

unreported opinion Judge Noonan dismissed the complaint on December 30, 1957.[2]

The parties agree as to the precise facts with respect to the settlement procedure required by the New York court. We feel called upon to remark that this procedure was, to say the very least, extraordinary. Mancino's case, heard without a jury, commenced on March 17, 1953. The following day, upon the completion of the presentation of Mancino's evidence, defendant moved to dismiss for failure to establish a prima facie case. The motion having been denied, defendant was prepared to begin a defense based upon the theory that Mancino's injury did not result from any unseaworthy condition of the vessel but instead resulted solely from the negligence of Mancino's fellow workers.[3] The trial judge announced, however, that, irrespective of the merits of the defense, unless defendant would consent to a settlement for $17,500 at this stage of the trial defendant should expect that at the conclusion of the case judgment would be entered against it for an amount that would approximate $35,000. Defendant's trial counsel objected to the obvious impropriety of such a demand; but, after conferring with an officer of defendant, counsel acceded to the demand, well aware of the fact that the trial judge, as trier of fact, had power to bring his

2 Defendant counterclaimed for the total amount of Mancino's judgment alleging plaintiff was obligated to indemnify it, claiming that Mancino's injury resulted from the negligence of Mancino's co-workers. The counterclaim has not yet been adjudicated. Judge Noonan's dismissal order of December 30, 1957 was appealed to this court. We dismissed the appeal for lack of a finding that there was no just cause for delay until the entire case could be adjudicated, a finding required by Rule 54(b) of the Federal Rules of Civil Procedure. *International Term Op. Co. v. Waterman S.S. Co.*, 255 F. 2d 657 (2 Cir. 1958). Judge Noonan modified the dismissal order to include this necessary finding on September 30, 1958. The entry of final judgment on plaintiff's claim for reimbursement, while postponing adjudication of the counterclaim, would seem to approach the limits of a district judge's discretion. *Panichella v. Pennsylvania R. Co.*, 252 F. 2d 452 (3 Cir. 1958); *District 65 v. McKague*, 216 F. 2d 153 (3 Cir. 1954). But the action appears to be adequate under Rule 54(b) to support this appeal. *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U. S. 445 (1956); *Bendix Aviation Corp. v. Glass*, 195 F. 2d 267 (3 Cir. 1952); *Omark Industries v. Lubanko Tool Co.*, 266 F. 2d 5[illegible] (2 Cir. 1959).

threat into actuality. Aware of Jarka's asserted "lien," the trial judge on the opening day of trial had directed defendant to communicate to Jarka the fact that settlement was imminent and that a Jarka representative should be present at court for any settlement conference. Defendant's counsel carried out the court's request, but an authorized official of Jarka replied that Jarka had no intention of being present, from belief that pressure would be exerted upon it to compromise its claim for reimbursement.[3] The following day, March 19, the trial judge ordered that defendant was to consent to judgment for $17,500 to be entered against it on March 20; defendant was to have a check for this amount in court to settle the judgment, and, in the meantime, defendant was to have no further communication with Jarka. In obedience to these explicit directions of the judge, all this was done on March 20.

We are called upon to decide, under the peculiar circumstances here present, what rights of reimbursement an employer may assert against the third party where the employer has notified the third party that it has made compensation payments and when the employee has thereafter obtained a judgment against the third party. The general theory of the Longshoremen's and Harbor Workers' Compensation Act is clear enough. With exceptions not here relevant, an employee is entitled to compensation if he is injured on navigable waters of the United States and is not eligible for compensation under state law, 33 U. S. C. 903. If his employer contests liability, and compensation payments[4] occur as the result of an award, any

3. In view of the doctrine in *The Ling*, 138 F. 2d 37 (3 Cir. 1943), plaintiff's fears that it could be forced to reduce its claim for reimbursement appears to be groundless.

4. As used in this opinion the phrase "compensation payments" includes payments for medical services and supplies under 33 U. S. C. 907 as well as payments under 33 U. S. C. 908 or 909.

right of action against third persons whose negligence may have caused the employee's injury passes to his employer by way of constructive assignment. 33 U. S. C. 914(a), 933(b). When this assignment occurs, and the employer is successful in an action against a third party, the amount by which the sum the employer recovers exceeds the amount of compensation payments it paid out must be turned over to the employee. 33 U. S. C. 933(e). If, however, no award has been made, the employee may bring an action against third persons in his own right. 33 U. S. C. 933(a); but there is no express statutory provision entitling an employer to reimbursement for compensation payments out of the sums so recovered by the employee. However, in keeping with the underlying principle of 33 U. S. C. 933(e) that the employer is entitled to reimbursement for its compensation payments courts uniformly have permitted the employer to intervene in an employee's suit against a third person in order to assert a claim to that portion of any judgment so recovered equal to the amount of compensation payments. The leading case is *The Etna*, 138 F. 2d 37 (3 Cir. 1943). *See* also *Fontain* v. *Pennsylvania R. Co.*, 106 F. Supp. 461 (S. D. N. Y. 1952), *aff'd*, 205 F. 2d 151, *cert. denied sub nom. Fontain* v. *Huron Stevedoring Co.*, 346 U. S. 886; *Ruggeris* v. *Liberty Mut. Ins. Co.*, 272 App. Div. 1027, 74 N. Y. S. 2d 428 (1947), *aff'd*, 298 N. Y. 775, 83 N. E. 2d 467;[3] and *cf. Poleski* v. *Moore-McCormack Lines*, 21 F. R. D. 579 (D. Md. 1958). *The Etna* holds that it would be improper for the employee to obtain double recovery by

[3] As the *Ruggeris* case clearly recognized, the employer's rights to reimbursement for compensation payments made under the Longshoremen's Compensation Act is a matter to be determined exclusively by federal law. The reason for dissatisfaction with the reasoning of *Clarke Corp.* v. *Fireman's Fund Indemnity Co.*, 286 App. Div. 148, 142 N. Y. S. 2d 360 (1955), app. den. 286 App. Div. 1003, 145 N. Y. S. 2d 313, app. dism'd 306 N. Y. 909, 131 N. E. 2d 908; a case purporting to decide the question which this opinion leaves open, is the fact that there the court rendered decision without reference to federal law

retaining that portion of the judgment that equals the amounts he has already received by way of compensation payments from his employer. This reasoning in no way supports the contention which appellant here advances. Appellant's *right* to reimbursement is not here in issue. The sole question here is whether an employer having that right, merely by notifying the party sued by its employee that compensation payments have been made, can shift to this third person the entire burden of protecting its right to a portion of any judgment or settlement. We leave open the question whether notification can have this result under normal circumstances.[6] We hold that, in the present case, in view of the fact that appellant does not dispute that appellee was ordered by a state court of competent jurisdiction to disregard the asserted claim of lien and to turn over the entire amount to the employee, plaintiff-employer must look only to its employee for satisfaction of its claim for reimbursement.

Judgment affirmed.

LUMBARD, *Circuit Judge* (dissenting):

I would reverse the order of the district court as the facts and the law do not support Judge Noonan's conclusion that International is estopped from recovering the amount of its compensation payments from Waterman Steamship Co., which it had duly notified.

[6] We note that under present law the employer's right to reimbursement is well protected. Under the *Hima* doctrine he may intervene in his employee's action. Or he may obtain from his employee's attorneys an agreement that they will retain for him from any judgment an amount equal to his compensation payments. See [illegible] S. S. Corp., 16[illegible] F. Supp. 371 (D. M.[illegible]). As a third method of protection it is at least arguable that by virtue of 33 U. S. C. 933(b) an employer, in order to protect its rights of reimbursement, may postpone compensation payments until an award, even though 33 U. S. C. 914(a) provides that payments should begin immediately unless an employer contests his liability.

There can be no doubt that under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901 *et seq.*, International, as Mancino's employer, was required by law to make payments to Mancino for medical expenses and compensation for loss of earnings following Mancino's injury in the course of unloading the S.S. Bienville, a vessel owned by the Waterman Steamship Co., on April 23, 1951.

Subsequently, on January 21, 1952, Mancino filed an election to sue the defendant, Waterman, as the third person allegedly responsible for the injury, and, on February 1, 1952, action was commenced in the Supreme Court of Kings County. To this action, neither International nor its predecessor, Jarka Corporation, was ever a party. However, on February 8, 1952, Jarka advised Waterman in writing of its payments to Mancino and notified Waterman that it would look to it for reimbursement of these monies pursuant to the Longshoremen's and Harbor Workers' Compensation Act "in the event a judgment is rendered or a settlement made."

Thereafter, on March 17, 1953, Mancino's action went to trial in the Supreme Court of Kings County. The Supreme Court justice, apparently exerting pressure on both sides to make a settlement, directed Waterman's counsel to send word to Jarka to be in court the following morning "to discuss the problem of Jarka's rights." This word was conveyed to Jarka and Jarka refused to attend as it had a perfect right to do. What then followed is set forth in the affidavit of Waterman's counsel, as follows:

> "On March 19, 1953, deponent appeared at about noontime before Mr. Justice ..... at a continuation of the trial. Being advised that Mancino would accept $17,500 and Waterman would pay that sum, Mr. Justice ..... directed how the

> case was to be terminated. He directed that, in behalf of the defendant, deponent consent to the entry of judgment in favor of Mancino for $17,500 without costs; that at the time of the entry of the judgment, deponent's firm would be prepared to deliver up a check in payment of the judgment in the amount of $17,500; that, simultaneously with the entry of judgment, Mancino's lawyers would deliver up a satisfaction of the judgment. Mr. Justice ..... directed deponent, as a member of the bar of the court, to have no further communication, directly or indirectly, with The Jarka Corporation or any of its employees about the matter until after judgment had been entered and satisfied." (Name of justice omitted.)

Waterman thereupon chose to follow the "directions" of the justice and a check for $17,500 in settlement of the case was turned over to Mancino in return for a satisfaction of judgment.

Judge Noonan has fittingly characterized the actions of the state court justice as "apparently improper activities of the trial court" and he further commented that these activities "put the defendant in an extremely awkward position vis-a-vis the plaintiff herein."

It is well settled that International, to the extent of the payments made, is subrogated to any rights that Mancino may have against the third party for the injuries on account of which the payments were made. *The Etna*, 138 F. 2d 37 (3 Cir. 1943); *Fontana v. Pennsylvania RR.*, 106 F. 461 (S. D. N. Y. 1952), aff'd. 205 F. 2d 151 (2 Cir. 1953), cert. denied, 346 U. S. 886 (1953); *Jarka v. Fireman's Fund Indemnity Co.*, 286 App. Div. 148, 142 N. Y. S. 2d 369 (1954), appeal denied 286 App. Div. 1003, 145 N. Y. S. 2d 315; appeal dismissed, 309 N. Y. 909, 131 N. E. 2d 908; 33 U. S. C. 933(b). It is also settled that the employer may invoke this right either by intervening in the suit between

the employee and the third party, *The Etna, supra*, or as here, by a separate action against the third party, *Jarka v. Fireman's Fund Indemnity Co., supra*.

Obviously, the state court justice had no right to compel the presence of Jarka or to make any direction on the basis of Jarka's failure to appear and Waterman does not even contend to the contrary. Waterman does argue, however, that it had virtually no alternative but to follow the state court justice's directions. Of course, Waterman could not by any such decision nullify International's rights under the statute. Waterman had the choice of resisting a court order and judgment which may have been rendered by reason of such resistance.

Of course, it is quite possible that Waterman felt that settling the case for $17,500 and running the risk of whatever obligation it might still owe to International was the best result which it could obtain. But it would seem clear to me that no matter what Waterman did, it could not destroy the claim any more than the state court justice could properly prevail upon Waterman or anyone else to effect a settlement so as to destroy International's rights.

For these reasons, I would vote to reverse and remand with the direction to enter summary judgment for the plaintiff for reimbursement of $5,094.02 compensation payments regarding which International had sent notice to Waterman. However, since the merits of Waterman's counterclaim against International for the $17,500 it paid Mancino have not yet been decided,[1] I would also direct that Waterman need not pay over the $5,094.02 to International until the counterclaim has been determined. Cf. *Iravani Motaghi v. Barkey Importing Co.*, 244 F. 2d 238, 260 (2 Cir. 1957).

1. Waterman's counterclaim against International is based on a claim that International's failure to perform properly its stevedoring contract caused Mancino's injury and thus Waterman is entitled to the amount it paid Mancino plus counsel fees, as the measure of damage flowing from this breach of contract. Cf. *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U. S. 563 (1958); *Ryan Stevedoring Co., Inc. v. Pan Atlantic Steamship Co.*, 350 U. S. 124 (1956).

APPENDIX B

United States Constitution
Amendment XIV

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Longshoremen's and Harbor Workers' Compensation Act

33 U.S.C. §901 *et seq.*:

§914

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

§933

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all

right of the person entitled to compensation to recover damages against such third person.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this title, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

APPENDIX C

[JUDGMENT]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of November one thousand nine hundred and fifty-nine.

Present:

Hon. CHARLES E. CLARK, *Chief Judge*.
Hon. J. EDWARD LUMBARD, Hon. STERRY R. WATERMAN,
Circuit Judges.

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Plaintiff-Appellant,

v.

WATERMAN STEAMSHIP CO.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellee.

/s/ DANIEL FUSARO,
Clerk.